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No. 79-516

In the Supreme Court of the United States

OCTOBER TERM, 1979

INLAND OIL & TRANSPORT CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-8 to A-11) is reported at 600 F.2d 725. The opinion of the district court (Pet. App. A-1 to A-7) is reported at 462 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on July 20, 1979. The petition for a writ of certiorari was filed on September 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying injunctive and declaratory relief against a governmental practice that is no longer in effect.

2. Whether the district court correctly determined that petitioner suffered no damages as a result of delay in the passage of its vessels through Locks and Dam No. 26 on the Mississippi River.

STATEMENT

Petitioner brought this action in the United States District Court for the Eastern District of Missouri against the United States, the Army Corps of Engineers, and various federal officials to enjoin the continued enforcement of a Special Notice to Navigation Interests issued on March 16, 1977, by the St. Louis District of the Army Corps of Engineers. Petitioner also sought a declaration that the procedures established by the Special Notice were illegal, as well as an award of actual and punitive damages (Pet. App. A-8).

The Special Notice established a locking precedence procedure at the main chamber of Locks and Dam No. 26, which is operated by the Corps of Engineers on the Upper Mississippi River at Alton, Illinois (Pet. App. A-1). The effect of the Special Notice was to establish a priority for tugboats and barges. In order to keep its place on the waiting list for transit through the main chamber, a tugboat had to be willing to assist other vessels using the locks. This assistance was required to be furnished without compensation or indemnification for possible damages. Boats that failed to follow this procedure lost their place in line.[1]

The Special Notice was adopted pursuant to 33 C.F.R. 207.300(d)(2), which provides that the "lockmaster may

[1]Locks and Dam No. 26 have both a main and an auxiliary chamber. The auxiliary chamber was not subject to the challenged precedence requirement (Pet. App. A-8).

prescribe such departure from the normal order of precedence as in his judgment is warranted to achieve best lock utilization" (Pet. App. A-3).[2] Seven months after its adoption, the requirement of the Special Notice dealing with aid and assistance to other vessels was rescinded, and the previously applicable rules of precedence were reinstated (*id.* at A-4).

During the period when the Special Notice was in effect, petitioner refused to allow its tugboats to render assistance as required by the Special Notice. As a result, it claimed that it suffered delays in using the locks on three occasions. Total actual damages of $640 were alleged (Pet. App. A-4 to A-7).

The district court denied petitioner's claim for injunctive and declaratory relief because the Special Notice had been rescinded and the challenged rules of precedence discontinued. The district court found that there was no " 'cognizable danger of recurrent violation' " and no danger of imminent or irreparable injury warranting equitable relief (Pet. App. A-4). The district court also found that petitioner had suffered no actual damage as a result of any delay and denied monetary relief (*id.* at A-5 to A-7). The court of appeals affirmed (*id.* at A-10 to A-11).

ARGUMENT

The court of appeals correctly rejected petitioner's contentions, and further review by this Court is unwarranted.

[2]Because of recurring traffic congestion problems at Locks and Dam No. 26, the Corps of Engineers contracted with Peat, Marwick, Mitchell & Co. to study alternative methods for increasing the locks' capacity, pending congressional authorization for the funding of a replacement facility. The precedence procedure was one of the suggested solutions (Pet. App. A-2 to A-3).

The challenged precedence procedures adopted by the Army Corps of Engineers applied only to one chamber of the locks in question and have now been rescinded. As the lower courts found, there is no indication that the challenged procedures will be reinstated. In these circumstances, the district court did not abuse its discretion in denying injunctive and declaratory relief. See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); see also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967).

For the reasons stated by the district court (Pet. App. A-4 to A-7), petitioner's claim for $640 in damages based on alleged delays in the passage of its vessels was without evidentiary support. And as the court of appeals noted (*id.* at A-9 n.2):

> [Petitioner] does not contend on appeal that the case is not ripe for summary judgment or that it would submit additional evidence if the cause were tried. Nor does [petitioner] ask this court to remand the case for trial.

In short, petitioner asks this Court to grant certiorari to review evidence relating to its damage claim and draw inferences of fact different from those of both courts below. That is a task this Court repeatedly has declined to undertake. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Boehmer* v. *Pennsylvania R.R.*, 252 U.S. 496, 498 (1920); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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